

New Laws Address Credit Reports, Gender Identity

LEGAL: Changes look to increase and create new fees collected by the state.

By **ANDREW KHOURI** Staff Reporter

It's that time of the year.

Time for business owners to quickly become familiar with the various new laws, rules and regulations that kick in every January — and depending on perspective — are either a blessing or a curse from Sacramento.

This year, amid a seemingly never-ending state budget crisis, many of the laws increase fines for noncompliance of current laws or institute new fees if employers don't abide by new ones.

"There is a lot of increasing of penalties this year," said attorney **Sue M. Bendavid**, chair of the employment law practice group at Encino-based **Lewitt Hackman**.

One such bill imposes penalties ranging from \$5,000 to \$25,000 if an employer is

found to willfully misclassify employees as independent contractors.

Bendavid said she has received numerous calls from worried certified public accountants who usually handle employee tax forms. A lot of that work will likely now be deferred to counsel, Bendavid said, adding that it remains to be seen how the courts and state agencies will define "willfully."

Stuart Waldman, president of the Valley Industry & Commerce Association, said the law could lead to "disgruntled" employees suing their former bosses for misclassification.

"It's a full-employment law for lawyers," he said.

Another law on employers' radar is one that bans, except in certain circumstances, employers from running credit checks on employees or potential new hires.



Waldman said the bill takes away a "right" of an employer to have all information needed before coming to the costly decision to hire. Without credit checks "you end up having people who aren't trustworthy, heavily in debt and embezzling from the company," he said.

The **Consumer Federation of California** supported the bill, which became a law in January. A blog post from the federation, written after the bill passed, said "a credit report is not a good indicator of a person's trustworthiness or work ethic, particularly considering how many people's credit scores have suffered due to the Great Recession."

The credit report bill carves out exemptions. Employers can still run credit reports for employees that can enter into financial contracts or transfer money on the employer's

behalf, managerial positions, positions where individuals regularly have access to \$10,000 or more of cash as well as other, mostly financial, exemptions.

Other laws taking effect in January limit the use of a federal immigration status check system, bar employers from discriminating based on genetic information, increase protections against discrimination based on employees' gender identity, and increase the length of time employers must offer health insurance to workers on pregnancy leave.

Waldman said while many of these new laws will make business operations more onerous, 2011 was still a good year. VICA won 75 percent of its legislative battles, no state tax increases passed and a string of bills eased some requirements under the California Environmental Quality Act for major projects, Waldman said.

In 2012, the best thing for employers is to stay informed, Bendavid said.

"It doesn't matter if you don't know the law, you are presumed to follow the law," she said.

2012's New Laws

The following list describes new laws that have an impact on business and took effect Jan. 1, unless otherwise noted.

■ Credit Check

AB 22 prohibits employers and prospective employers, not including certain financial institutions, from obtaining and using consumer credit reports (credit information) about applicants or employees. The prohibition does not apply to "managerial positions," defined as those who qualify for the executive exemption from overtime.

■ Pregnancy Disability Leave

SB 299 requires all employers with five or more employees to continue to maintain and pay for health coverage under a group health plan for an eligible female employee who takes Pregnancy Disability Leave (PDL) up to a maximum of four months in a 12-month period.

■ Willful Misclassification of Independent Contractors

SB 459 provides new penalties of between \$5,000 to \$25,000 for the "willful misclassification" of independent contractors.

■ Written Commission Agreement

AB 1396 requires employers who have commission pay arrangements to put those agreements into a signed written contract. The written contract must set forth the method by which the commissions will be computed and paid. The bill is effective January 1, 2013. Employers have the entirety of 2012 to bring their commission agreements into compliance.

■ Notice of Pay Details

AB 469 requires employers to provide nonexempt employees, at the time of hire, a notice that specifies:

- The rate of pay and the basis, whether hourly, salary, piece commission or otherwise, including any overtime rate.
- Allowances, if any, claimed as part of the minimum wage, including meal and lodging allowances.
- The regular pay day designated by the employer as required under the Labor Code.
- The name of the employer, including any "doing business as" names.
- The physical address of the employer's main office or principal place of business and any mailing address, if different.
- The telephone of the employer.
- The name, address and telephone number of the employer's workers' compensation carrier.

■ Organ and Bone Marrow Donor Leave

SB 272 clarifies the implementation of California's organ and bone marrow donor leave law. The new legislation clarifies that the days of leave are business days, not calendar days, and that the one-year period is measured from the date the employee's leave begins.

■ Genetic Information

SB 559 amends the Fair Employment and Housing Act (FEHA) to state that employers are prohibited from discriminating against employees on the basis of genetic information.

■ Gender Expression

AB 887 amends the Fair Employment and Housing Act to further define "gender" to include both gender identity and "gender expression" and to make clear that discrimination on either basis is prohibited. AB 887 also amends Government Code relating to dress codes to include that an employee must be allowed to dress consistently with both the employee's gen-

der identity and gender expression.

■ E-Verify

AB 1236 allows employers to continue to choose to use E-Verify, but prohibits California state agencies and local governments from passing mandates that require employers to use E-Verify.

Several cities in California passed local ordinances requiring the use of E-Verify in certain circumstances. This new law prohibits such state or local mandates, unless required by federal law or as a condition of receiving federal funds.

■ Interference with Rights Under Leave Laws

AB 592 adds language to the California Family Rights Act (CFRA) and the Pregnancy Disability Leave law (PDL) that makes it unlawful to interfere with or in any way restrain the exercise of rights under these laws.

■ Administrative Penalties

AB 240 allows an employee that alleges a minimum wage violation to recover liquidated damages pursuant to any complaint brought before the Division of Labor Standards Enforcement (DLSE). This new law would allow the Labor Commissioner to also award such damages. Under the new liquidated damages provision, the employee would be entitled to recover an amount equal to the wages unlawfully unpaid, plus interest.

■ Wage Penalties

AB 551 increases the maximum penalty from \$50 to \$200 per calendar day for each worker paid less than the determined prevailing wage and increases the minimum penalty from \$10 to \$40 per day for violations of prevailing wage obligations. It also increases the penalty from \$25 to \$100 per calendar day, per worker, against contractors and subcontractors that fail to respond to a written request for payroll records within 10 days.

■ Farm Labor Contractors – Wage Notices

AB 243 amends the Labor Code to expand the information that must be included on pay statements, but only for farm labor contractors. Employers that are farm labor contractors must now disclose on the itemized payroll statement furnished to their employees, the name and address of all legal entities (for example other growers or other farm labor contractors) that secured the employer's services.

■ Agricultural Labor Relations

SB 126 affects certification of bargaining representatives for agricultural employees. The new law, SB 126, provides that if the Agriculture Labor Relations Board (ALRB) finds employer misconduct that "in addition to affecting the outcome of the election, would render slight the chances of a new election reflecting the free and fair choice of employees," then the ALRB can certify the labor union as the exclusive bargaining agent for employees.

■ Insurance Non-Discrimination Act

SB 757 closes an existing loophole and prevents employers that operate in multiple states from discriminating against same-sex couples by not providing the same insurance coverage for domestic partners as they do for spouses.

■ State Contracts – Gender or Sexual Discrimination

SB 117 outlaws the state of California from entering into contracts of more than \$100,000 with companies that discriminate against the employees on the basis of gender or sexual orientation with regard to benefits. The new law makes it clear that companies doing business with the state of California cannot deny equal benefits to same-sex spouses.

■ Apprentices Programs

SB 56 changes the audit requirements for apprenticeship

programs. This new law eliminates the mandate of random audits during five-year increments, and instead directs the Division to conduct audits of apprenticeship programs generally. It also creates requirements for applications for building and construction trades programs for approval of a new or expanded apprenticeship program.

■ Safe Lifting – Hospitals

AB 1136 provides that general acute care hospitals must maintain a safe patient handling policy for patient care units, including trained lift teams or training in safe lifting techniques for staff. The safe patient handling policy must be kept in accordance with the California Occupational Safety and Health Act and should be part of the Injury Illness and Prevention Program (IIPP) of these specific employers.

■ California Transparency in Supply Chains Act

SB567 requires retail sellers and manufacturers to disclose their efforts to ensure their company's operations are free from slavery and human trafficking. The legislation applies to companies doing business in California that bring in more than \$100 million in gross receipts. Under the law retail sellers and manufacturers are required to audit and verify their supply chains to evaluate potential risks of human trafficking and slavery. Company employees and management dealing directly with supply chain management must also undergo training on human trafficking and slavery, particularly within the supply chain of products. The disclosure must be posted on the retailer or manufacturer's website with an easily understood link from the homepage.

■ Workers' Compensation Legislation

• AB 335 – Requires the workers' compensation administrative director (AD) to work with the Commission on Health and Safety and Workers' Compensation (CHSWC) to develop regulations regarding notices to injured workers; requires AD and CHSWC to develop and make accessible a booklet written in plain language about the workers' comp claims process; streamlines and simplifies other notices to employees.

• AB 378 – Lowers workers' compensation costs by establishing guidelines for dispensing compound drugs, the circumstances under which those drugs would be covered and the reimbursement amount, and removes the incentives for physicians to refer patients to pharmacies in which the physician or physician's family has a financial interest.

• AB 397 – Seeks to address the underground economy problem by singling out contractors that do not have workers' compensation coverage but requiring contractors that are exempt from having coverage at the time they are licensed to certify they are still exempt or have gotten coverage at the time of their license renewal.

• AB 1168 – Lowers costs for employers and insurers by establishing a fee schedule for vocational experts' services.

• AB 1426 – Streamlines the workers' comp process and eliminates duplicative bureaucracy and inconsistency by eliminating the court administrator position.

• AB 228 – Amends California Insurance Code to authorize the State Compensation Insurance Fund (SCIF) to provide workers' compensation coverage to a California employer whose California employees temporarily work outside the state and whose injuries while performing out-of-state work might lead to workers' compensation liability in some other state.

SOURCE: California Chamber of Commerce; www.calchamber.com